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IN THE

Supreme Court of the United States

SAN REMO HOTEL, L.P., ET AL.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* DEFENDERS OF PROPERTY RIGHTS AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* DEFENDERS OF PROPERTY RIGHTS AND NEW ENGLAND LEGAL FOUNDATION

Pursuant to Rule 47.3, *amici curiae* Defenders of Property Rights and New England Legal Foundation respectfully submit this brief in support of petitioners and ask that the judgment below be reversed.[1]

INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights ("Defenders") is the only national public interest legal foundation devoted exclusively to protecting private property rights. Defenders participates in litigation across the country involving property rights and the Takings Clause of the Constitution. Since its founding in 1991, Defenders has participated in many significant property rights cases before the United States Supreme Court, including *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of Court. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

New England Legal Foundation ("NELF") is a non-profit, public interest law firm, incorporated in 1977 and headquartered in Boston, Massachusetts. Its membership consists of corporations, law firms, individuals and others who support policies aimed at fueling economic growth, protecting the free enterprise system and defending economic rights. NELF regularly appears in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities, including *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000), *cert. denied*, 532 U.S. 1048 (2001).

Defenders and NELF have a vital interest in protecting the rights of property owners from undue interference by federal, state and local regulation and thus in this Court's decisions involving the Fifth Amendment's Takings Clause — the primary constitutional bulwark against such in-terference.

SUMMARY OF ARGUMENT

This case provides an opportunity for the Court to address the court of appeals' treatment of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson*, 473 U.S. 172 (1985), as requiring that a property owner claiming that state or local regulation effects an unconstitutional taking under the Fifth Amendment must "seek compensation through the procedures the State has provided for doing so" — including full state court adjudication — before a claim will be considered ripe in federal court. For the reasons explained below, the more

appropriate view of the Fifth Amendment is that, when a state or local administrative action restricting the use of private property becomes final, and the regulatory authority does not make restitution for resulting economic loss, the property owner has a ripe claim in federal court that the state or local government has "taken [property] for public use, without just compensation." U.S. Const. amend. V. Prior, duplicative state-court litigation is not necessary to ripen such a claim.

In our view, as we explain below, the Court's precedent leading up to *Williamson County* does not support the court of appeals' reading of the decision. Moreover, even if the Court did intend *Williamson County* to impose the "state litigation requirement," that ruling is not *compelled* by the text of the Fifth Amendment and this Court may adopt a different interpretation if there are sufficiently strong reasons to depart from the doctrine of *stare decisis*.

Those reasons are present here. The state litigation requirement has run headlong into preclusion and abstention doctrines that deprive property owners in many cases of *any* opportunity to litigate their regulatory takings claims in federal court.[2] Indeed, *Williamson County* creates a "Catch

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[2] Commentators have long noted that *Williamson County*'s ripeness requirements create significant, unintended barriers to property owners pursuing federal takings claims in federal court. *See, e.g.*, Stephen E. Abraham, *Williamson County Fifteen Years Later: When is a Takings Claim (Ever) Ripe?*, 36 Real Prop. Prob. & Tr. J. 101, 104 (2001) ("*Williamson County* is regarded as posing formidable hurdles because of its two-part ripeness requirement, finality and compensation, that ultimately may block takings claims."); Maz Kidalov & Richard Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Litigation*, 27 Hastings Const. L.Q. 1, 5 (1999) ("The U.S. Supreme Court has developed rules that make it almost impossible for federal courts to remedy violations of the Just Compensation Clause.").

22" for would-be federal takings plaintiffs: the federal court has no jurisdiction until the state court suit is completed (*Williamson County*), but completion of the state court suit precludes relitigation in federal court pursuant to the principles of res judicata, collateral estoppel and/or the *Rooker-Feldman* doctrine. In practical effect, then, there is no federal court remedy for regulatory takings. *See generally* Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers, in* Institute on Planning, Zoning, and Eminent Domain § 7 (Matthew Bender 1991); Douglas W. Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zoning & Planning Law Report 57 (1990).

For example, in the present case, a California state court held that petitioners had no claim against the City of San Francisco. The Ninth Circuit then held that the state court's decision barred petitioners from litigating their Takings Clause claim in federal court. Thus, *Williamson County*'s ripeness requirement had the effect of granting the state court the only word on whether the city's regulation constituted a taking — although the state court stated unequivocally that it did *not* address the question as a matter of federal constitutional law.

That inappropriate consequence cannot be what this Court intended in *Williamson County*. Recognizing this, courts of appeals in several circuits have jumped through

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The state litigation requirement, when combined with the doctrines of preclusion, has proven entirely unworkable. *See, e.g.*, Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 2 Wash. U. J.L. & Pol'y 99, 102 (2000) ("When property owners follow *Williamson County* and first sue in state court, they are met in some federal circuits with the argument that state court litigation, far from ripening the federal cause of action, instead has extinguished it.").

linguistic or procedural hoops to avoid the harsh effects of the preclusion and abstention doctrines when combined with the state litigation requirement. *See, e.g., Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130, 130 n.7 (2d Cir. 2004); *DLX, Inc. v. Commonwealth of Kentucky*, 381 F.3d 511, 518 n.3 (6th Cir. 2004). But those measures have resulted in a lack of uniformity in the lower courts and, even in circuits in which one can avoid preclusion or abstention by following certain procedures, traps for the unwary.

The appropriate answer to the chaotic and unfair state of the law is for this Court, as only it can do, to set aside the state litigation requirement. The Court should hold that a property owner may challenge in federal court a state or local regulation as an unconstitutional taking under the Fifth Amendment as long as the application of the regulation by the authority administering it is "final" within the meaning of *Williamson County*.

ARGUMENT

I. A TAKINGS CLAIM UNDER THE FIFTH AMENDMENT IS RIPE WHEN A STATE OR LOCAL ADMINISTRATIVE AGENCY ISSUES A FINAL DECISION THAT HAS THE EFFECT OF RESTRICTING THE USE OF PRIVATE PROPERTY WITHOUT COMPENSATION.

The Takings Clause of the Fifth Amendment provides: "Nor shall property be taken for public use, without just compensation." U.S. Const. amend. V. Property is "taken for public use" in a variety of ways stopping short of actual condemnation by the government. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001) (stating that a taking may occur when "a regulation interferes with reasonable investment-backed expectations") (citing *Penn Central Transp. Co. v. City of New York*, 438

U.S. 104, 124 (1978)); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (stating that application of a general regulation constitutes a taking when either it does not substantially advance a legitimate state interest or it denies the owner economically viable use of her land). Because government regulations rarely provide compensation to affected property owners, the dispositive legal issue in "regulatory takings" claims under the Fifth Amendment is ordinarily whether the regulation constitutes a "taking" as defined by this Court's precedent.

When a regulation (or, more often, a decision applying a regulation in a particular case) becomes final, the issue of whether it constitutes a taking is ripe for adjudication. *See Lujan v. National Wildlife Found.*, 497 U.S. 871, 891 (1990) ("[A] regulation is . . . considered . . . 'ripe' for judicial review . . . [once] the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him."); *cf. 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 198 (D.C. Cir. 2003) ("[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all") (internal quotation marks and brackets omitted). If a regulatory action becomes final and the property owner receives no compensation, then the constitutional question is squarely presented. Requiring a property owner to challenge that action in state court does not make the constitutional claim more ripe — at best, it delays the resolution of the federal claim, and, at worst, it bars a federal court from addressing the constitutional issue at all.

II. THIS COURT SHOULD EITHER CLARIFY OR RECONSIDER *WILLIAMSON COUNTY*'S RIPENESS REQUIREMENT.

According to the court of appeals, in *Williamson County*, the Court placed two ripeness hurdles in front of takings claims brought in federal court against state and local governments or their political subdivisions. The first requirement — that a plaintiff receive a final administrative decision from the agency whose action is being challenged before filing in federal court — was satisfied in this case. 473 U.S. at 185. The purported second requirement — that plaintiffs "seek compensation through the procedures the State has provided for doing so" before turning to the federal courts, *id.* at 194 — is at issue.

Several lower courts have read *Williamson County* to mean that a property owner may not litigate any regulatory takings claim in federal court before exhausting state remedial options — including bringing a state court lawsuit. It is not clear, however, that *Williamson County* mandates that step. In that case, respondent had not obtained a final *administrative* decision regarding the application of the challenged zoning ordinance and subdivision regulations to its property. Thus, the federal court could not rule "until the administrative agency [had] arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191.[3] Although the Court made a passing reference to the state's inverse-condemnation procedures, *id.* at 197, because the Court did

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[3] "As in *Hodel*, *Agins*, and *Penn Central*, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause." *Williamson County*, 473 U.S. at 190.

not base its holding on any failure to satisfy a state litigation requirement, any language in the Court's decision that might be read as imposing such a requirement should properly be viewed as dictum. *See e.g.*, *Printz v. United States*, 521 U.S. 898, 963 (1997) (stating that the Court was not bound by language in a prior case that "was wholly unnecessary to the decision of the case"); *cf. Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.").[4]

Even if *Williamson County* did impose a state litigation requirement, there are good reasons for this Court to reconsider it.[5]

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[4] The Court's more recent decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), moreover, supports the view that *Williamson County* did not impose a state litigation requirement. In *International College*, the Court concluded that the district court properly granted the City's motion to remove, *inter alia*, plaintiff's federal takings claim despite the state court's having not determined the issue of just compensation. 522 U.S. at 529-31.

[5] *Stare decisis* "is at its weakest" when a prior decision involved the interpretation of the United States Constitution. *Agostini v. Felton*, 521 U.S. 203, 217 (1997) (*stare decisis* policy "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions"); *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.") (internal quotation marks omitted); *see also Neal v. United States*, 516 U.S. 284, 295 (1996). This Court has recognized an exception to *stare decisis* for precedents that have proved "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." *Vasquez v. Hillery*, 474 U.S. 254, 266, (1986); *see also Teague v. Lane*, 489 U.S. 288, 333 (1989) (Brennan, J., dissenting) (quoting *Vasquez*). The state litigation requirement that the

First, *Williamson County*'s doctrinal underpinnings do not support a state litigation requirement. The Court in *Williamson County* drew an analogy to claims brought against the *federal* government under the Tucker Act. 473 U.S. at 194-95 (discussing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 998-99 (1984)). In *Monsanto*, a chemical company alleged that the government's disclosure of trade secrets submitted confidentially in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") amounted to an unconstitutional taking. 467 U.S. at 998-99. In the context of a takings claim against the federal government, however, the Tucker Act provides the exclusive procedural mechanism for pursuing compensation. It also provides a federal forum for the resolution of such cases.[6]

The Court in *Monsanto* considered whether the company could bring its Tucker Act suit immediately or first had to exhaust FIFRA's remedial provisions, which required the company to participate in settlement or arbitration proceedings. *Id.* at 1018-19. Seeking to reconcile the two statutory remedies, the Court stated that "FIFRA does not withdraw the possibility of a Tucker Act remedy, but merely requires that a claimant first seek satisfaction through the statutory procedure." *Id.* at 1018. The Court explained that "[e]xhaustion of the statutory [FIFRA] remedy is necessary to determine the extent of the taking that has occurred. To

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Ninth Circuit has drawn from *Williamson County* presents just such a circumstance.

[6] The Tucker Act provides, in part: "The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution, or any Act of Congress." 28 U.S.C. § 1491. The Tucker Act thus specifies *which* federal forum is available; by no means does the statute deprive the property owner of a federal forum — the unfortunate and unnecessary result in this case.

the extent the operation of the statute provides compensation, no taking has occurred and the original submitter has no claim against the government." *Id.*

The Court in *Williamson County*, relied on *Monsanto* to conclude that:

> taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

473 U.S. at 195.

Monsanto's holding was not so broad. The Court did not require that the company "avail[] itself of the process provided by the *Tucker Act*," *id.* at 195 (emphasis added); the Court's analysis focused only on the requirements of *FIFRA*. But for the settlement/arbitration provisions of FIFRA, a Tucker Act claim would have been immediately available. Unlike the extended administrative and state court proceedings required to ripen a taking claim under *Williamson County*, a Tucker Act claim is ripe as soon as a remedy is denied under the challenged statute. *See Monsanto*, 467 U.S. at 1018.

Monsanto, therefore, provides no basis for *Williamson County*'s conclusion that the Fifth Amendment requires a property owner to first seek compensation in state court. If anything, *Monsanto*'s rule leads to a reading of *Williamson County* in which a takings claim against a state or local government is ripe when the administrative agency has rendered a final determination as to the challenged

regulation. *Williamson County* should not be read as extending the holding in *Monsanto* that the company had to exhaust FIFRA's remedial provisions as equivalent to its state court litigation requirement.[7]

The other case cited in *Williamson County* for the state court exhaustion principle, *Parratt v. Taylor*, 451 U.S. 527 (1981), was a Due Process Clause decision and likewise does not support reading a state litigation requirement into the Fifth Amendment. In *Parratt*, the Court held that a prisoner's due process claim under § 1983 was not ripe until the prisoner exhausted the adequate post-deprivation remedy provided by state law. *Id.* at 543. The Court in *Williamson County* explained that "[a] person . . . does not state a claim under the Due Process Clause merely by alleging the deprivation of property," and that "the Constitution is satisfied by the provision of meaningful process." 473 U.S. at 195 ("[A] state's action is not complete [in the sense of causing a constitutional injury] unless or until the state fails to provide an adequate postdeprivation remedy for the property loss.") (citing *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)). *Parratt* does not require that a party pursue all available state-court remedies. Reading a state litigation requirement into *Williamson County* thus fails to recognize the fundamental distinction between the Takings Clause and the Due Process Clause: The Takings Clause requires more than just adequate *process*, it guarantees a *result* —specifically, the fair value, in money, of the property taken. *See United States v. Miller*, 317 U.S. 369,

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[7] The *Monsanto* decision hinged on the specific provisions of FIFRA. The exhaustion requirement the Court announced may well be inapplicable to federal government actions taken pursuant to other, if not most, statutes. "Generally, an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act." 467 U.S. at 1017.

379-80 (1943); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).[8]

Second, the state litigation requirement that the courts of appeals have drawn from *Williamson County* has had the unintended and unfair consequences of completely depriving property owners of a federal-court remedy for violation of their Fifth Amendment rights.

The long-established rules of claim and issue preclusion bar the relitigation of claims or issues in federal court once a state court decides them. These doctrines are a "fundamental rule of law that serve an important public interest by ensuring a decisive end to litigation." 18 James Wm. Moore et al., Moore's Federal Practice 131.12[1] (Matthew Bender 2003) (citing *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1979) ("The doctrine of res judicata serves vital public interests . . . This Court has long recognized that '[public] policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once

[8] *Parratt* is distinguishable on its facts, as well. The challenged conduct in *Parratt* was "a random and unauthorized act by a state employee." 451 U.S. at 541. This circumstance made provision of a pre-deprivation hearing "impossible or impracticable" and led to the conclusion that resort to a state's post-deprivation remedial process was sufficient and necessary. *Williamson County*, 473 U.S. at 195. As a consequence of this "random act" predicate, *Parratt* has no applicability to situations "in which the deprivation of property is effected pursuant to an established state policy or procedure, [because in such cases] the state could provide predeprivation process." *Id.* at 195 n.14. Because a taking of private property is presumably effected pursuant to an established policy or procedure, *Parratt*'s post-deprivation process rule is inapplicable in the takings arena.

tried shall be considered forever settled as between the parties . . . '")).[9]

Circuit courts have applied these principles to hold that once a takings case is litigated in state court, it cannot be relitigated in federal court. *See, e.g., Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment*, 178 F.3d 1295 (6th Cir. 1999) (affirming district court's dismissal of takings claim adjudicated in state court based on res judicata), *cert. and reh'g denied*, 528 U.S. 871 (1999); *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (affirming district court's dismissal of a takings claim adjudicated in state court based on issue preclusion); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319 (10th Cir. 1998); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989). *See also* John J. Delaney and Duane Desiderio, *Who Will Clean Up The "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 203 (1999) ("[P]roperty owners received no resolution of their taking claims in 83 percent of [federal] District Cases [from 1990-

[9] Yet, this Court's decision in *Williamson County* only prolongs litigation. It effectively requires that a would-be federal takings plaintiff challenge the allegedly unconstitutional state action twice — once in state court, once in federal court. In other words, far from discouraging the "second bite of the apple" that the preclusion doctrines are intended to prevent, *Williamson County* force feeds it. Courts thus have had to choose between traditional rules of preclusion and district court jurisdiction on the one hand and *Williamson County*'s state litigation requirement on the other.

1998]").[10] As this case demonstrates, a federal taking claim may be barred, even when a state court expressly decides only state-law issues.

Relatedly, courts have employed the *Rooker-Feldman* doctrine to deprive *Williamson County* state-court litigants of federal just compensation remedies. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). These cases together stand for the proposition that parties aggrieved by a state-court decision cannot appeal that decision to a federal district court; rather, they must petition for a writ of certiorari from the United States Supreme Court. *See generally* Susan Bandes, *The Rooker-Feldman Doctrine: Evaluating Its Jurisdictional Status*, 74 Notre Dame L. Rev. 1175 (1999). *See, e.g.*, *Wilkinson*, 142 F.3d at 1324-25 (stating the ripeness requirement in a federal takings claim is insufficient to preclude application of res judicata and collateral estoppel principles, and *Rooker-Feldman* doctrine precludes federal courts from reviewing state court judgments); *Gash Assoc. v. Village of Rosemount*, 995 F.2d 726, 728-29 (7th Cir. 1993) (holding that under *Rooker-Feldman*, federal takings plaintiffs cannot file collateral attacks on state court's civil judgments in federal district court, but instead must seek review in the Supreme Court); *Adams Outdoor Advertising v. City of East Lansing*, 2001 U.S. Dist. LEXIS 5549, *1, 12-15 (W.D. Mich. 2001) (granting summary judgment to municipal takings defendant based on *Rooker-Feldman* doctrine). *Rooker-Feldman*, therefore, represents another means by which a state litigation requirement applied by the courts of appeals deprives takings litigants of their day in federal court.[11]

In sum, the requirement of duplicative adjudication of the same claim, in addition to being a time-wasting hurdle for the courts and litigants even when a federal claim is allowed, often altogether bars federal courts from reviewing plaintiffs' Fifth Amendment claims for just compensation. In fact, between 1990 and 1997, federal courts, citing *Williamson County*, declined to review over 90 percent of all cases that dealt with land-use takings issues. Alex F. Annett, The Heritage Foundation, *How Congress Can End the "Regulatory Limbo" Blocking Property Owners' Access*

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[10] The Third, Sixth and Tenth Circuits have been the most strict in applying the doctrine of res judicata to prevent litigants from trying to exercise their rights under the Fifth Amendment and 42 U.S.C. § 1983. *See, e.g., Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 (10th Cir. 1998); *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-728 (3d Cir. 1989).

The Second, Fourth, Fifth and Eleventh Circuits avoid res judicata by allowing property owners to file initially in federal court while filing a "reservation" in state court. This "reservation" allows the state court to hear issues of state law while reserving federal constitutional issues to be decided later by a federal trial. *See, e.g., Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130, 130 n.7 (2d Cir. 2004); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976).

The Ninth Circuit has vacillated about which approach to take. It hinted at accepting the approach of the Fourth and Eleventh Circuits in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (*Dodd I*). However, in *Dodd II* it went back to its old approach of invoking res judicata. *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (*Dodd II*). The Ninth Circuit relied on *Dodd II* in the instant case in holding that issue preclusion barred petitioners' federal takings claim. *San Remo Hotel, L.P. v. San Francisco City and County*, 364 F.3d 1088, 1095 (9th Cir. 2004).

[11] The Third Circuit recently expanded *Rooker-Feldman* further to apply to any federal case in which the parties are the same and the claims are similar. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 364 F.3d 102, 104 (3d Cir. 2004), *cert. granted*, 125 S.Ct. 310 (2004).

to Justice, FYI No. 154 October 1, 1997. No other federally-protected right is so encumbered by a state litigation requirement or other preconditions to federal litigation. *See, e.g.*, Gregory M. Stein, *Regulatory Takings and Ripeness in Federal* Courts, 48 Vand. L. Rev. 1, 23 (1995) ("The state compensation portion of [*Williamson*] finds no parallel in the ripeness cases from other areas of the law."). And no other class of federal constitutional plaintiffs are so routinely shut out of the federal courthouse. *See* Michael M. Berger, *Supreme Bait & Switch*, 2 Wash. U. J.L. & Pol'y, at 124.

The Court should disavow any reading of *Williamson County* that requires such a result. For one thing, it is anomalous to suggest that a right guaranteed by the United States Constitution may not be litigated in federal court. *See Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."); *Jacobs v. United States*, 290 U.S. 13, 15 (1933) (stating that an inverse condemnation suit rests on the Fifth Amendment and is therefore based on the Constitution: "The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary.").

Furthermore, no such intention can reasonably be gleaned from the Court's language in *Williamson County*. There, in concluding that respondent's claim was "*premature*," 473 U.S. at 185 (emphasis added), the Court explained that respondent "has not *yet*" complied with the Court's ripeness requirements, *id.* at 186 (emphasis added), and that its federal claim "[will] not be ripe *until*" it does so, *id.* at 495 (emphasis added). This, of course, is logical: the

doctrine of ripeness seeks to postpone consideration of claims where to do so would be premature. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998) (stating that withholding consideration of petitioner's claim would not cause significant hardship because respondent would have "ample opportunity to bring its legal challenge [at a later time]"). But ripeness should not be used to preclude parties from bringing claims at all.

Recognizing the gravity of the current state of affairs for takings plaintiffs, some circuits have crafted exceptions to the preclusion and *Rooker-Feldman* doctrines for plaintiffs who unwillingly litigate their takings claims in the first instance in state court pursuant to *Williamson County*. *See, e.g., DLX, Inc.*, 381 F.3d at 518 n.3 (refusing to apply *Rooker-Feldman* to bar petitioner's takings claim: "*Williamson County* . . . clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court"); *Santini*, 342 F.3d at 130, 130 n.7 (holding that, notwithstanding preclusion and *Rooker-Feldman* doctrines, federal courts may hear takings cases where petitioners pursue their inverse condemnation action in state court to comply with *Williamson County* but reserve their federal claim pursuant to *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964)); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000) (rejecting applicability of *Rooker-Feldman* doctrine in takings case where litigation in state court was necessitated by *Williamson County*); *cf. Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487, 497 (6th Cir. 2001) (holding that *Rooker-Feldman* bars federal takings claim where plaintiff brought both federal and state takings claims in state court and, after removal and remand, failed to reserve federal claim).

This piecemeal approach, whereby circuit courts seek to circumvent the harsh effects of *Williamson County*, is inadequate to address the inequities leveled against takings plaintiffs throughout the country who seek federal guardianship of their Fifth Amendment rights from state and local regulatory decisions. The current ripeness procedure required by some circuit courts of appeal in the name *Williamson County* compromises the efficient functioning of the court system and simultaneously undermines a fundamental constitutional right.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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